



**Ninety-Seventh Legislature - Third Special Session - 2002**  
**Committee Statement**  
**LB 1**

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**Hearing Date:** November 12, 2002

**Committee On:** Judiciary

**Introducer(s):** (Speaker Bromm, at the request of the Governor)

**Title:** Change provisions relating to sentencing procedures for capital crimes

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**Roll Call Vote – Final Committee Action:**

Advanced to General File

X Advanced to General File with Amendments

Indefinitely Postponed

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**Vote Results:**

5 Yes Senators Brashear, Connealy, Johnson, Quandahl, Tyson

3 No Senators Chambers, Pedersen, Robak

Present, not voting

Absent

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**Proponents:**

Senator Curt Bromm

Joe Kelly

J. Kirk Brown

**Representing:**

Introducer

Nebraska County Attorneys

Nebraska Department of Justice

**Opponents:**

Alan Peterson

Dennis Keefe

David Stickman

Bob VanValkenburg

Robert Creager

Mark Heath, M.D.

Timothy Butz

Lela Shanks

Kenneth Winston

John Krejci

**Representing:**

Self

Lancaster County Public Defender

Nebraska Criminal Defense Attorneys Assoc.

Self

Nebraska Criminal Defense Attorneys Assoc.

Nebraskans Against the Death Penalty

Nebraska ACLU

Self

Nebraskans Against the Death Penalty

Nebraska Chapter of National Association of  
Social Workers

**Neutral:**

Jerry Soucie

Richard Hedrick

**Representing:**

Nebraska Commission on Public Advocacy

Self

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## Summary of purpose and/or changes:

Legislative Bill 1 changes the provisions relating to sentencing procedures for first degree murder.

Under current Nebraska law in a jury trial for first degree murder, the jury is released after determining guilt. Within seven days of a defendant being found guilty of first degree murder, the district court sets a hearing to decide a sentence of death or life imprisonment. The arbiter and finder of fact, during the hearing is the trial judge or, at the option of the trial judge, a three judge panel with the trial judge as a member of the panel. At such hearing, evidence is presented and arguments are made by the parties as to the existence of aggravating and mitigating factors and the appropriate sentence in light of such factors.

Aggravating circumstances are limited to those provided in statute and need to be proved beyond a reasonable doubt. Mitigating circumstances are not limited to those codified in statute. There is no statutory evidentiary standard, and generally evidence of mitigating factors is considered by the court.

Following the presentation of evidence and argument by the parties, the court (whether the trial judge or a three judge panel) determines whether aggravating circumstances exist and whether such factors justify the death penalty. The court then determines whether mitigating factors exist and whether such factors “approach or exceed the weight” of the aggravators. At least one aggravating circumstance must exist to support a sentence of death and such aggravators cannot be outweighed by any mitigating factors.

After determining 1) the existence of an aggravator or aggravators and 2) that such aggravator(s) warrant a sentence of death, and 3) that any mitigating factors do not outweigh the aggravator(s), the judge or judge panel must consider whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

All death sentences are automatically appealed to the Supreme Court of Nebraska (Court). No sentence of death is final until the Court affirms such. In its review of a case in which death was imposed at the trial level, the Court performs a separate comparative proportional review of the case as to the appropriateness of the sentence of death.

LB 1 requires the county attorney to allege the specific aggravator(s) in the information (the criminal pleading alleging the murder) that he or she intends to prove at the sentencing hearing. LB 1 allows the county attorney to amend any information already filed at any time before the thirtieth day before trial, and thereafter at any time before trial for good cause shown.

LB 1 eliminates the 3-judge panel option, but maintains the provision that the trial judge hears the sentencing phase if the defendant waives a jury hearing for sentencing. In such cases, the hearing is conducted similarly to the manner it presently is.

In cases in which a jury acts as fact finder during for sentencing, the bill provides for the following process:

Aggravation phase. Following a determination of guilt, whether by a trial jury or judge, the court conducts an aggravation phase. The purpose of the aggravation phase is for the prosecution to introduce evidence and prove the facts supporting the alleged aggravator(s) contained in the information. The prosecution must prove such factors beyond a reasonable doubt.

After presentation of evidence and arguments by the parties, the court instructs the jury as to the definitions of the aggravating factors and the state’s burden to prove the existence of the aggravating factors alleged in the information beyond a reasonable doubt. The jury then is required to render a verdict specifically identifying each aggravator alleged in the information

and finding as to whether each has been proven to exist beyond a reasonable doubt. The verdict of the jury must be unanimous.

If the jury is not unanimous with regard to an aggravator, the court shall not consider such aggravator in the penalty phase.

Following the rendering of its verdict, the jury is discharged. LB 1 states that the verdict of a jury is not intended to be an order which a party can appeal.

If the jury returns a verdict as to the existence of at least one aggravator alleged in the information, the court shall proceed to the penalty phase.

*Penalty phase:*

If the jury failed to determine the existence of any aggravators, the court shall sentence the defendant to life imprisonment.

If the jury did determine the existence of at least one aggravator, the court shall hear evidence of mitigating factors and shall follow the current statutory process for determination of a sentence of life imprisonment or death.

LB 1 states that the changes made therein are intended to be procedural and not substantive. LB 1 contains an emergency clause.

**Explanation of amendments, if any:**

*Summary of current Nebraska sentencing process for death penalty cases*

Under current Nebraska law in a jury trial for first degree murder, the jury is released after determining guilt. Undercurrent law, the sentence is determined by the trial judge or, at the option of the trial judge, a three judge panel with the trial judge as a member of the panel. A hearing as to the existence of aggravating and mitigating factors is held before the judge or panel of judges.

Aggravating circumstances are limited to those provided in statute and need to be proved beyond a reasonable doubt. At least one aggravating circumstance must be found in order to justify a sentence of death. Mitigating circumstances are not limited to those codified in statute and any mitigating evidence may be presented.

Once the court determines that aggravating circumstances exist, it determines whether such factors justify the death penalty. The court then determines whether mitigating factors exist and whether such factors “approach or exceed the weight” of the aggravators. After this “weighing” process, the judge or judge panel must consider whether the sentence of death is “excessive or disproportionate” to the penalty imposed in similar cases.

*Summary of Ring v. Arizona*

At his trial, Ring was found guilty by a jury of first degree murder in connection with an armed robbery. Under Arizona law, (similar to Nebraska law) Ring could not be sentenced to death unless further findings of aggravating circumstances were made by the trial judge in a sentencing hearing that followed the jury trial.

At the sentencing hearing, the trial judge found two statutory aggravating factors, including a finding that the murder was committed in an especially heinous, cruel or depraved manner. The judge determined that the “heinousness” of the crime was evidenced in Ring’s statement to an accomplice, introduced only at the sentencing hearing, in which he expressed pride in his marksmanship at shooting a guard during the commission of the robbery. The jury did not hear the evidence regarding Ring’s boast to an accomplice. The judge found that the mitigating circumstance of Ring’s relatively minor prior criminal record did not outweigh the effect of the aggravators.

On appeal, Ring argued that Arizona’s capital sentencing scheme violates the jury trial guarantee of the Sixth Amendment to the federal constitution because the trial judge was required to find facts with respect to aggravating circumstances and the effect of the aggravators was to raise the maximum penalty of the crime beyond that to which he could be sentenced based the jury verdict alone (that is, the existence of the aggravating circumstances raised the maximum penalty from life imprisonment to death). As the jury did not hear or consider the evidence supporting the aggravating factors that justified Ring’s death sentence, Ring argued that his right to a jury trial was denied.

The United States Supreme Court (Supreme Court), in a 7-2 decision, overturned Ring’s death sentence on Sixth Amendment grounds. *Ring v. Arizona*, 536 U.S. \_\_\_, 122 S.Ct. 2428 (2002). The Supreme Court reasoned that because Arizona’s enumerated aggravating factors for first degree murder operate as “the functional equivalent of elements to a greater criminal offense,” the Sixth Amendment requires that such factors be found by a jury. In previous cases, the Supreme Court had held that a defendant has a right under the Sixth Amendment to have any fact that acts as an “element” of a crime determined by a jury. In the *Ring* case the Supreme Court held that a jury must determine the facts supporting the existence of aggravating circumstances in the death penalty sentencing process. As functional equivalents of elements to a crime, aggravating circumstances also need to be proven beyond a reasonable doubt.

The Supreme Court has recently distinguished between facts that constitute “sentencing factors” (which may be considered by a judge as part of the sentencing determination) and those that act as “functional equivalents of elements” (which must be considered by a jury unless the defendant waives that right). Only the aggravating circumstances are the “functional equivalent of elements,” so the Supreme Court did not require that any other aspect of the sentencing process be decided by a jury.

Accordingly, *Ring* does not require that the jury determine the actual sentence of an individual found guilty of first degree murder. Justice Antonin Scalia stated in his concurring opinion: “Those states that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factors in the sentencing phase”.

*Ring* reversed an earlier decision of the Supreme Court in which it specifically rejected a Sixth Amendment claim to Arizona’s judge-only phase to capital sentencing. In 1990, the Supreme Court held in *Walton v. Arizona* that the Arizona capital sentencing law, which provided that a judge, not a jury, was the ultimate finder of fact with respect to the existence of aggravating circumstances, was constitutional under the Sixth Amendment.

However, in 2000 the Supreme Court held in *Apprendi v. New Jersey* that a judge could not make findings of fact that would increase a defendant's sentence beyond the statutory maximum, since that those facts were equivalent to “elements” and not “sentencing factors.” The *Apprendi* decision expressly did not overturn *Walton*, even though the logic of *Walton* appeared to be undermined by the reasoning of *Apprendi* (that any fact that could increase the statutory maximum – which aggravating circumstances in capital cases clearly do – must be considered by a jury). Such “inconsistency” remained unresolved until the *Ring* case, which ultimately resolved the conflict by overruling *Walton*.

Therefore, Nebraska’s capital sentencing structure – which had been considered to be constitutionally sound based on the explicit precedent of *Walton* – is now constitutionally suspect and presumably invalid. Legislative Bill 1 represents the legislative response to the *Ring* decision.

### **Summary of Legislative Bill 1**

Legislative Bill 1, introduced by the Speaker, at the request of the Governor, sets forth modifications to Nebraska’s existing statutory first degree murder sentencing process in response to the Supreme Court decision in *Ring v. Arizona*.

LB 1 requires the county attorney to allege the specific aggravator(s) in the information (the criminal pleading alleging the murder) that he or she intends to prove at the sentencing hearing. LB 1 allows the county attorney to amend any information already filed at any time before the thirtieth day before trial, and thereafter at any time before trial for good cause shown.

LB 1 eliminates the 3-judge panel option, but maintains the provision that the trial judge hears the sentencing phase if the defendant waives a jury hearing for sentencing. In such cases, the hearing is conducted similarly to the manner it presently is.

In cases in which a jury acts as fact finder during for sentencing, the bill provides for the following process:

#### **Aggravation phase:**

Following a determination of guilt, whether by a trial jury or judge, the court conducts an aggravation phase. The purpose of the aggravation phase is for the prosecution to introduce evidence and prove the facts supporting the alleged aggravator(s) contained in the information. The prosecution must prove such factors beyond a reasonable doubt.

After presentation of evidence and arguments by the parties, the court instructs the jury as to the definitions of the aggravating factors and the state’s burden to prove the existence of the aggravating factors alleged in the information beyond a reasonable doubt. The jury then is required to render a verdict specifically identifying each aggravator alleged in the information and finding as to whether each has been proven to exist beyond a reasonable doubt. The verdict of the jury must be unanimous.

If the jury is not unanimous with regard to an aggravator, the court shall not consider such aggravator in the penalty phase.

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*Penalty phase:*

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*Summary of Committee Amendment*

The committee amendment maintains much of the original version of LB 1 in its approach to accommodating the *Ring* decision. The amendment maintains the two-phase process (aggravation phase and penalty phase) for the determination of sentences in capital cases following guilt, but departs with LB 1 with regard to the three-judge panel provision. The amendment also amends several statutes that require harmonizing with the effect of this legislation for which LB 1 did not address.

Section 1 of the amendment adds harmonizing language to section 28-105.01, which prohibits application of the death penalty to any person with mental retardation. The amendment would require a hearing on the defendant's mental retardation only if a jury has found the existence of one or more aggravating circumstances or if the jury determination has been waived. Since the mental retardation hearing is significant only if an aggravating circumstance is found, the hearing on mental retardation was placed after the determination of aggravating circumstances. It was also determined to not be preferable to retain the trial jury while the issue of mental retardation was determined. This matter was not addressed in the original bill.

Section 2 of the amendment makes harmonizing changes to the first-degree murder statute, section 28-303. These harmonizing changes were not provided in the original bill.

Section 3 of the amendment changes procedures for filing the information (the equivalent of an indictment). The information provides official notice to the defendant of the charges against him or her. The changes in section 3 are made to harmonize with the changes made in section 4. These harmonizing changes were not provided by the original bill.



Section 4 of the amendment adds provisions to require the state to provide a notice of aggravation in any information for first degree murder in which the death penalty is sought. The *Ring* decision indicates that such notice is appropriate in order to ensure that the requirements of due process are met. Such notice is necessary in order to allow the aggravation proceeding to take place as soon as practicable after the trial of guilt, while the jury that determined guilt is retained. The provisions of the proposed amendment are similar to the provisions in the original bill, but unlike the original bill, the amendment does not allow the state to add or amend the information within thirty days of the start of the trial.

Section 5 of the amendment makes harmonizing changes to section 29-2004, a statute regarding juries and jurors. These harmonizing changes were not provided by the original bill.

Section 6 makes harmonizing changes to section 29-2027, a statute regarding verdicts in homicide cases. These harmonizing changes were not provided in the original bill.

Section 7 adds harmonizing language to section 29-2261, a statute relating to presentence investigations (PSI). Under current law, a PSI is required following a conviction in all felony and serious misdemeanor cases. To avoid the practical problem of requiring the jury that determined guilt to be retained while the PSI report is completed, and because there are no sentencing issues if no aggravating circumstance is found (life imprisonment is the only available sentence) the amendment provides that a PSI will not be ordered until after a jury finds one or more aggravating circumstance to exist or if the jury determination is waived. This matter was not addressed in the original bill.

Section 8 adds a new subsection to the intent language regarding the death penalty. The language is similar to some language employed in the original bill, but is substantially restated.

Paragraph (a) states that the legislative bill is in response to *Ring v. Arizona*.

Paragraph (b) states that the changes are intended to be procedural only and ameliorative of prior procedures.

Paragraph (c) states that the changes are not intended to alter substantive provisions of the death penalty process.

Paragraph (d) states that aggravating circumstances are “functional equivalents of elements” of an offense, but are not intended to constitute elements generally unless required by the state or federal constitution.

Paragraph (e) states that, to the extent that such can be applied in accordance with state and federal constitutional requirements, it is intended that the changes made by the bill apply to any sentencing process commencing on or after the effective date of the act.

Section 9 of the amendment amends section 29-2520 to essentially a new section setting forth the procedure for jury determination of aggravating circumstances.

- If notice of aggravation has not been given in the information, then a sentence of life imprisonment shall be entered.
- The jury determination shall be made by the jury which has determined the defendant's guilt, unless the defendant had waived his or her right to a jury trial of guilt, or the trial jury has been discharged. In the latter cases, a new jury would be impaneled. This is similar as in the original bill.
- The Nebraska Evidence Rules shall apply at the aggravation hearing. This was assumed, but not stated, in the original bill.
- If the jury is the same jury that determined guilt, evidence from the trial of guilt may be considered by the jury during the aggravation hearing. This was also provided in the original bill.
- Each aggravating circumstance shall be proved beyond a reasonable doubt and each verdict on each aggravating circumstance shall be unanimous. This was also provided in the original bill.
- If the jury reaches a verdict finding one or more aggravating circumstances, then the process continues to the sentencing determination procedure. If the jury does not find any aggravating circumstances, then a sentence of life imprisonment is entered. This is similar to the original bill.

Section 10 amends section 29-2521 to provide for the new sentencing determination procedure.

- The sentence shall be determined by either:
  - A three-judge panel including the trial judge with two additional active district court judges named at random; or
  - A three-judge panel of active district court judges named at random, not including the trial judge, if the Chief Justice determines that the trial judge is disabled or disqualified.
  - The availability of the three-judge panel is a change from the original bill, which eliminated the three-judge panel option.
- When the jury determination of aggravating circumstances has been waived, the sentence determination proceeding shall include evidence of aggravating and mitigating circumstances. The panel shall make written findings of what aggravating circumstances are found to exist beyond a reasonable doubt. This was also provided in the original bill.



- When the jury has determined the existence of aggravating circumstances, the sentence determination proceeding shall include evidence of mitigation or proportionality. This is similar to the provisions in the original bill.

Section 11 adds a new section to clarify that the determination of aggravating circumstances is not an appealable order. This is similar to a provision contained in the original bill.

Section 12 makes harmonizing changes to section 29-2522, the section that defines the factors to be employed by the judge or panel in reaching the decision as to imposing a death sentence (weighing of aggravators and mitigators; proportionality). This is similar to provisions in the original bill.

Section 13 makes harmonizing changes to section 29-2523, the definition of aggravating and mitigating circumstances. This change was not provided in the original bill.

Section 14 makes harmonizing changes to section 29-2524, a statute that addresses the appeal process.

Section 15 makes harmonizing changes to section 29-2543, a statute that addresses death warrants.

Section 16 adds a severability clause. This was not provided in the original bill.

Section 17 repeals the original sections.

Section 18 adds an emergency clause. This was also provided in the original bill.

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**Senator Kermit A. Brashear, Chairperson**